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SCHOOL LAW—REJECTING DISGRUNTLED STUDENTS' CLAIMS: A MODERN EDUCATIONAL THEORY

Zellman v. Independent School District No. 2758, 594 N.W.2d 216 (Minn. Ct. App. 1999), *review denied*, (Minn. July 28, 1999); *Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468 (Minn. Ct. App. 1999)

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I. INTRODUCTION

In recent years, educators, politicians and citizens have become increasingly aware of student discipline problems in schools.[1] Schoolteachers and administrators often find it difficult to deal effectively with these discipline problems.[2] The difficulty stems in part from students' and parents' threats of legal actions.[3] As one teacher stated, "We have empowered parents to such a degree that the administration quakes at the thought of a parent coming in. So to avoid possible conflict, whatever the parent wants goes."[4]

Students and parents bring a variety of legal claims against school officials. The claims sound in tort or contract theories such as fraud, misrepresentation or breach of fiduciary duty, or due process or statutory violations.[5] One example of a claim is "educational malpractice,"[6] a specific tort alleging that an educational institution failed to meet acceptable educational standards.[7] Student dissatisfaction claims may be made against public primary schools, public secondary schools, private primary schools, or private secondary, trade or graduate schools.[8]

Part II of this case note will provide a general discussion of two recent Minnesota Court of Appeals cases, *Zellman v. Independent School District No. 2758*[9] and *Alsides v. Brown Institute, Ltd.*,[10] involving student dissatisfaction claims and how these cases relate to modern educational

1. *See, e.g.*, Margaret Carlson, *No More Teachers' Silly Rules*, TIME, Oct. 21, 1996, at 27; *Class, Come to Order!*, THE EDUC. DIG., Jan. 1996, at 24; John W. Donohue, *Brandishing the Rod*, AM., Jan. 13, 1996, at 4; Edna Varner, *Make Discipline Problems Improve Instruction*, THE EDUC. DIG., Sept. 1999, at 18; Stephen Wallis, *Discipline and Civility Must Be Restored To America's Public Schools*, USA TODAY, Nov. 1995, at 32; Jeanne Wright, *Discipline and Order in the Classroom*, CURRENT, July-Aug. 1997, at 23; *20/20, Feel Good About Failure* (ABC television broadcast, Aug. 1, 1999), *available at* <http://www.abcnews.go.com/onair/20. . .ipts/2020_990801_esteem_-trans.html> [hereinafter *20/20*].

2. *See, e.g.*, Wright, *supra* note 1, at 25.

3. *See id.*

4. *Id.*

5. *See* Kevin P. McJessy, *Contract Law: The Proper Framework for Litigating Educational Liability Claims*, 89 NW. U. L. REV. 1768, 1775-84 (1995).

6. *See, e.g.*, Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992); Cencor, Inc. v. Tolman, 868 P.2d 396 (Colo. 1994); B.M. v. State, 649 P.2d 425 (Mont. 1982).

7. *See* McJessy, *supra* note 5, at 1769.

8. *See, e.g.*, Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978); Goss v. Lopez, 419 U.S. 565 (1975); VanLoock v. Curran, 489 So. 2d 525 (Ala. 1986); Cencor, Inc. v. Tolman, 868 P.2d 396 (Colo. 1994).

9. 594 N.W.2d 216 (Minn. Ct. App. 1999), *review denied*, (Minn. July 28, 1999).

10. 592 N.W.2d 468 (Minn. Ct. App. 1999).

theory regarding discipline. A discussion of the historical significance of student dissatisfaction will follow in Part III, including a discussion of how federal courts and courts of other jurisdictions have treated the issue and past legal treatment in Minnesota. Part IV will further describe the court's decisions and its reasoning in *Zellman* and *Alsides*. Finally, this case note will analyze those decisions, including future implications and the decisions' effect on modern psychological theory in the school system.

II. *ZELLMAN* AND *ALSIDES*: HOW THE CASES RELATE TO MODERN EDUCATIONAL THEORY

In deciding *Zellman* and *Alsides* the Minnesota Court of Appeals reviewed certain pivotal student dissatisfaction issues for the first time. *Zellman* involved a public high school student who was disgruntled with the school district for taking disciplinary action against him.[11] The student received a grade of "zero" on a history project because he plagiarized in part from a reference book.[12] The school's action was in accordance with school policy.[13] The school board affirmed the grade after an investigation, principal's review, a hearing before the school board and the school district board's review.[14] The student brought suit, claiming breach of contract and a due process violation.[15] After reviewing the claim, the court of appeals affirmed the school district board's decision.[16]

Alsides concerned a different student dissatisfaction issue. The claim was made against a secondary trade school.[17] Students were disgruntled with the poor quality of their education.[18] The students sued for "fraud, misrepresentation, breach of contract, consumer fraud, and deceptive trade practices."[19] The district court dismissed the claims under summary judgment.[20] The court rejected the claims because the claims sounded in educational malpractice and violated public policy.[21] In addition, the trial court held that the Consumer Fraud Act[22] and Uniform Deceptive Trade

11. *See Zellman*, 594 N.W.2d at 219.
12. *See id.* at 218.
13. *See id.*
14. *See id.* at 219.
15. *See id.* at 218.
16. *See id.* at 222.
17. *See Alsides*, 592 N.W.2d at 470.
18. *See id.* at 471.
19. *Id.*
20. *See id.*
21. *See id.*
22. MINN. STAT. § 325F.69, subd. 1 (1998).

Practices Act[23] do not apply to education.[24]

The Minnesota Court of Appeals affirmed the district court's rejection of educational malpractice claims.[25] However, it carved a narrow exception permitting specific claims of breach of contract, fraud and misrepresentation that do not entail "an 'inquiry into the nuances of educational processes and theories.'"[26] In addition, in reversing the district court, the appellate court held that the Minnesota Consumer Fraud Act and Uniform Deceptive Trade Practices Act might apply to education.[27]

Numerous jurisdictions have addressed such student dissatisfaction issues.[28] Most jurisdictions largely have rejected the claims based on various public policy reasons.[29] For example, many courts are reluctant to become involved in reviewing educational policies, goals, disciplinary decisions and procedures.[30] Courts claim that these issues depend upon numerous factors and thus are difficult to determine fairly.[31] In addition, many courts believe that professional educators and school boards are in the best position to establish and enforce policies.[32]

Despite the strong public policy arguments the courts set forth, commentators have criticized their decisions not to intervene.[33] Generally,

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23. *Id.* § 325D.43 (1998).

24. *See Alsides*, 592 N.W.2d at 471.

25. *See id.* at 476.

26. *Id.* at 473 (citing Ryan v. University of N.C. Hosps., 494 S.E.2d 789, 791 (N.C. Ct. App. 1998)).

27. *See id.* at 476.

28. *See, e.g.*, Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992); Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854 (Cal. Ct. App. 1976); Cencor, Inc. v. Tolman, 868 P.2d 396 (Colo. 1994); B.M. v. State, 649 P.2d 425 (Mont. 1982); Andre v. Pace Univ., 655 N.Y.S.2d 777 (N.Y. App. Div. 1996).

29. *See Alsides*, 592 N.W.2d at 472.

30. *See id.*

31. *See id.* (noting that educational malpractice claims should be rejected for several reasons: (1) difficulty in ascertaining a standard of care for educators; (2) uncertainty about causation and the amount of damages; (3) the possibility of a flood of litigation against schools; (4) the impropriety of the court system overseeing the daily activities of school).

32. *See id.*

33. *See, e.g.*, Catherine D. McBride, *Educational Malpractice: Judicial Recognition of a Limited Duty of Educators Toward Individual Students; A State Law Cause of Action for Educational Malpractice*, 1990 U. ILL. L. REV. 475, 476 (1990) (advocating limited claims against school officials to assure that they correctly implement their own policies); McJessy, *supra* note 5, at 1769 (arguing that schools should be held legally accountable for their actions for two reasons: first, students are "consumers of education" and thus should have input into its activities, and second, concern that schools are failing to properly educate children).

this criticism is part of a long-established student rights movement.[34] Parents are more involved than ever in assuring that school officials do not discipline children and that children receive a valuable education.[35]

In reaction to this student rights movement, one modern psychological theory supposes that the lack of discipline arising from fear of parental complaints hurts students' education.[36] This lack of discipline results in overly confident, disrespectful children who hinder the learning process for themselves and other students.[37] Because administrators fear parental complaints, teachers receive little administrative support and cannot effectively perform their jobs or control their classrooms.[38]

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34. *See generally* Allan L. Schwartz, Annotation, *Administration of Corporal Punishment in Public School System as Cruel and Unusual Punishment Under Eighth Amendment*, 25 A.L.R. FED. 431, 434-35 (1998) (prompting attorneys to keep current with the continuing developments in students' rights laws). *See also* Carlson, *supra* note 1, at 27 (pointing out how involved parents have become in assuring that teachers do not discipline children); Wallis, *supra* note 1, at 32 (describing the "erosion" of student discipline and academic culture over time).

35. *See generally* Carlson, *supra* note 1, at 27 (stating that parents no longer give teachers "the benefit of the doubt in disciplinary matters," but now challenge "them on the grounds that little Johnny is perfect and any blot on his transcript will keep him out of Harvard"); Wright, *supra* note 1, at 25 (discussing two situations: one where a mother was furious that her son had to do push-ups in class for misbehaving, and another where a mother complained that her son was excluded from a class party for misbehaving).

36. *See* Wright, *supra* note 1, at 23-25 (pointing out that even if most children in a class are cooperative and eager to learn, one disruptive student can hinder the learning process for the entire class).

37. *See id.* at 25. Many educators are concerned that schools focus too much on promoting children's self-esteem at the expense of learning. *See id.* "[S]o much emphasis has been put on promoting students' self-esteem that educators are afraid to discipline or demand good behavior from kids because they'll be accused of hurting their self-esteem. 'We're raising a generation of ill-behaved, rude kids . . . but, by God, they feel great.'" *Id.* (quoting high school teacher Deborah Sanville); *see also* Wallis, *supra* note 1, at 33 ("[T]he notion of 'self-esteem' as a sunny, 'feel-good' exercise is undermining real education, self-discipline, and achievement. It is largely false and obscures the need for students to work hard, demonstrating perseverance and understanding honesty, responsibility, opportunity, and possibilities, to achieve success."); *20/20*, *supra* note 1 (discussing studies that show that violence may be the result of artificially high self-esteem, and noting one study showing that prisoners as a group have a much higher self esteem than college students).

38. *See, e.g.*, Carlson, *supra* note 1, at 27; Donahue, *supra* note 1, at 4 (discussing new "teacher immunity" laws in Alabama and Virginia that will assure administration back-up if a teacher is "hailed to court by an indignant parent"); Wallis, *supra* note 1, at 33; Wright, *supra* note 1, at 24 (noting that teachers are "isolated and frustrated"). *But see* Wright, *supra* note 1, at 24 (noting administrative accusations that teachers exaggerate discipline problems, and that some educators merely blame administration because they do not want to initiate discipline on their own).

Student dissatisfaction claims play an important role in this struggle. Courts that refuse to interfere with school boards' and officials' actions and decisions allow such officials to make fair decisions based on professional experience without answering or explaining to a higher authority. As a result, school officials can better support decisions of the teaching staff in educating and disciplining students.

The Minnesota Court of Appeals decisions in *Zellman* and *Alsides* support this modern psychological theory by rejecting student dissatisfaction claims.[39] In both cases, the court refused to engage in educational disputes.[40] However, the court then balanced this refusal by properly permitting interference only in cases of schools' extremely egregious conduct.[41]

III. HISTORY

A. *Historical Common Law*

1. *Discipline*

Historical discussion relating to court treatment of school discipline generally pertains to discipline in public schools rather than private schools. The analysis pertaining to the two types of schools are distinguishable because public schools are state entities. State law creates the schools and state and local authorities administer the schools,[42] thus implicating the U.S. Constitution.[43]

State and federal courts, including the U.S. Supreme Court,[44] generally extend deference to educators' academic assessments as a vital element of academic freedom.[45] Courts often are reluctant to interfere

39. *See supra* notes 16 and 25 and accompanying text.
40. *See supra* notes 16 and 25 and accompanying text.
41. *See infra* notes 160-62, 177 and accompanying text.
42. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 573 (1975).
43. U.S. CONST. amend. XIV, § 1. The due process clause of the Fourteenth Amendment states "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." *Id.*
44. *See* Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Regent of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985); Board of Educ. v. McCluskey, 458 U.S. 966 (1982); Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978); Wood v. Strickland, 420 U.S. 308 (1975); Waugh v. Board of Trustees, 237 U.S. 589 (1915). *But see* Carey v. Piphus, 435 U.S. 247 (1978) (affirming a finding of due process violation and permitting students nominal damages for their complaint); *Goss*, 419 U.S. at 565 (affirming the district court's finding that a suspension for ten days with no hearing violated the students' due process rights).
45. *See* Thomas A. Schweitzer, *"Academic Challenge" Cases: Should Judicial Review*

with the professional judgment of school officials and administrators.[46] Courts, however, show greater willingness to review disciplinary actions when discipline relates to behavioral misconduct rather than poor academic performance.[47]

The courts analyze due process complaints under a well-established framework.[48] The Fourteenth Amendment forbids the state from depriving any person of life, liberty or property without due process of law.[49] A citizen has a protected property interest as long as it is provided by "state statutes or rules entitling the citizen to certain benefits"[50] or by a contract between parties.[51] A liberty interest is implicated where "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him or her."[52]

When a property or liberty interest is at stake, the school must satisfy due process requirements and, at a minimum, provide the student with notice and an opportunity to be heard.[53] This procedure assures a fair factual determination based on both sides of the story.[54] The type of notice and hearing depends on the circumstances of the case.[55] For example, extreme conduct may call for immediate action to protect other children at school.[56] In general, however, a hearing should precede

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Extend to Academic Evaluations of Students?, 41 AM. U. L. REV. 267, 271-72 (1992).

46. *See id.* at 272.

47. *See generally Ewing*, 474 U.S. at 224-25 (finding no arbitrary state action in dismissing a student from a university undergraduate/medical program); *Horowitz*, 435 U.S. at 90 (stating that a hearing is not necessary to satisfy due process in cases of academic dismissal); *Waugh*, 237 U.S. at 591 (finding no constitutional violation in prohibiting fraternities at state institutions); Schweitzer, *supra* note 45, at 304-06 (discussing the holding in *Horowitz*, including Justice Marshall's dissent). *But see Horowitz*, 435 U.S. at 97 (Marshall, J., dissenting) (criticizing the majority opinion "in its assumption that characterization of the reasons for a dismissal as 'academic' or 'disciplinary' is relevant to resolution of the question of what procedures are required by the Due Process Clause").

48. *See infra* notes 49-81 and accompanying text.

49. *See* U.S. CONST. amend. XIV, § 1.

50. Goss v. Lopez, 419 U.S. 565, 572-73 (1975).

51. *See Ewing*, 474 U.S. at 223 (citation omitted) (stating that agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances," could be independent sources of property interests); Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (stating one must have more than a unilateral expectation of a property right).

52. *Goss*, 419 U.S. at 574.

53. *See id.* at 579-81 (holding that a ten-day suspension or less from school required oral or written notice of the charges against the student, an explanation of the evidence against him, and a chance to present his side of the story).

54. *See id.* at 580.

55. *See id.* at 579.

56. *See id.* at 580, 582-83 ("Students whose presence poses a continuing

dismissal.[57] Courts have established broad guidelines for the hearing. For example, students have no right to counsel at the hearing, no right to call witnesses, nor any right to confront and cross-examine witnesses.[58]

In contrast to discipline cases, academic dismissal cases, such as those based on poor grade performance, impose fewer procedural due process requirements.[59] The U.S. Supreme Court formally acknowledged this position in 1978, holding that academic dismissal did not require a hearing.[60] In that case, a medical student was dismissed for failing to meet certain academic standards.[61] School officials continually informed the student of "faculty dissatisfaction" with her academic performance.[62] Officials also permitted an examination of the student by seven physicians to assure proper grading.[63] The court held that these procedures were sufficient to fulfill due process requirements.[64] Since this opinion, other courts have followed suit in imposing less procedural due process requirements in academic dismissal cases.[65]

Many school actions implicate property or liberty interests.[66] If state law provides a right to public education and a student is suspended from school, he or she may have been deprived of a property interest in his or her education.[67] Courts have been less willing to find a property interest

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danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable.").

57. *See id.*

58. *See id.* at 583 (holding that such measures would be more costly than effective and could destroy the value of discipline in the education system).

59. *See infra* notes 60-65 and accompanying text.

60. *See* Board of Curators v. Horowitz, 435 U.S. 78, 90 (1978) (reasoning that the "educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students;" thus, holding it could be damaging to the process to require a hearing in situations of poor academic achievement).

61. *See id.* at 79.

62. *See id.* at 85.

63. *See id.*

64. *See id.*

65. *See, e.g.*, Lewin v. Medical College of Hampton Roads, 910 F. Supp. 1161, 1164-65 (E.D. Va. 1996).

66. *See infra* notes 67-70 and accompanying text.

67. *See* Goss v. Lopez, 419 U.S. 565, 573 (1975) (stating that whether a property interest has been implicated depends on the time of suspension and holding that suspension for ten days or more requires due process procedures); *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) (holding that a two-day suspension does not call for extensive due process protections); Zehner v. Central Berkshire Reg'l Sch. Dist., 921 F.Supp. 850, 858 (D. Mass. 1995) (finding that a three-day suspension required due process).

when a student has not been suspended or expelled from school.[68] For example, "a student's interest in taking part in interscholastic athletics only 'amounts to a mere expectation rather than a constitutionally protected claim of entitlement.'"[69]

The U.S. Supreme Court has noted that school suspension for a period of ten days or longer "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[70] The damage to reputation in those situations may implicate a liberty interest as well as a property interest.

In addition to procedural due process rights, students also may be entitled to substantive due process rights.[71] Procedural due process merely guarantees a "fair decision-making process" before the government takes away an individual's life, liberty or property.[72] In contrast, substantive due process protects "against the use of arbitrary rules of law which are the basis of those proceedings," thus dealing with the substance of the underlying law.[73]

When a student is suspended from public school, the suspension violates substantive due process only if "the right affected is 'implicit in the concept of ordered liberty.'"[74] In *C.B. v. Driscoll*,[75] school administrators suspended a student for fighting, shouting obscenities and injuring administrators.[76] The court rejected the student's substantive due process claim, saying there is no fundamental right to attend school and, thus, no substantive violation from a suspension.[77]

Substantive due process primarily arises in academic dismissal cases.[78]

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68. *See infra* note 69 and accompanying text.

69. *Zehner*, 921 F. Supp. at 862 (citing Walsh v. Louisiana High Sch. Athletic Ass'n, 616 F.2d 152, 159 (5th Cir. 1980)).

70. *Goss*, 419 U.S. at 575.

71. *See* Board of Curators v. Horowitz, 435 U.S. 78, 91 (1978).

72. *See* RONALD D. ROTUNDA, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 14.6 (3d. ed. 1999).

73. *See id.*

74. C.B. v. Driscoll, 82 F.3d 383, 387 (11th Cir. 1996) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

75. 82 F.3d 383 (11th Cir. 1996).

76. *See id.* at 385.

77. *See id.* at 387.

78. *See* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 224-25 (1985); Board of Curators v. Horowitz, 435 U.S. 78, 91 (1978); Lewin v. Medical College of Hampton Roads, 910 F. Supp. 1161, 1167 (E.D. Va. 1996). *But see Ewing*, 474 U.S. at 229 (Powell, J., concurring) (stating that the majority opinion incorrectly confuses substantive due process with procedural due process, and opining that an interest in continued enrollment is not a fundamental interest protected by substantive due process from the Constitution).

Courts generally hold that academic dismissal from a public school may violate substantive due process if it is "clearly arbitrary or capricious."[79] However, in *Board of Curators v. Horowitz*,[80] the U.S. Supreme Court alluded to its distaste for such claims, noting its difficulty in reviewing an academic decision under this standard.[81]

2. *Educational Malpractice*

Educational malpractice claims first arose in the 1970s, when the public became increasingly critical of education.[82] Educational malpractice entails two types of claims: (1) failure to properly educate; and (2) improper evaluation and placement.[83] Although courts distinguish between the two claims,[84] the analysis and outcome usually is the same.[85]

Despite persistent attempts to hold schools liable for educational malpractice, courts generally resist such claims.[86] In fact, one commentator summarizes educational malpractice as a theory "beloved of

79. *See Horowitz*, 435 U.S. at 91 (citing Mahavongsanan v. Hall, 529 F.2d 448, 449 (5th Cir. 1976)); *see also Lewin*, 910 F. Supp. at 1167 (quoting *Ewing*, 474 U.S. at 225 and holding that where challenged action rests on academic decision, that decision should be upheld unless "it is such a substantial departure from accepted academic norms as to demonstrate that the person did not actually exercise professional judgment").

80. 435 U.S. 78 (1978).

81. *See id.* at 91.

82. *See* Thomas G. Eschweiler, *Educational Malpractice in Sex Education*, 49 SMU L. REV. 101, 102 (1995) (explaining that courts were loathe to impose liability on educational institutions due to public policy considerations).

83. *See id.*

84. *See* McBride, *supra* note 33, at 476.

85. *See id.* at 479; *see also* Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854, 854 (Cal. Ct. App. 1976) (rejecting, on public policy grounds, plaintiff's claim for failure to properly provide basic academic skills); Torres v. Little Flower Children's Serv., 474 N.E.2d 223, 226-27 (N.Y. 1984) (rejecting plaintiff's claim for improperly testing plaintiff as mentally retarded because of the plaintiff's inability to speak English); Hoffman v. Board of Educ., 400 N.E.2d 317, 318 (N.Y. 1979) (rejecting plaintiff's claim for educational malpractice where plaintiff was initially tested as being mentally retarded and was thereafter placed in a school for the retarded, even though a recommended test two years after the initial test would have revealed that plaintiff was not retarded); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1353 (N.Y. 1979) (rejecting plaintiff's claim for failure to provide a basic education).

86. *See* Eschweiler, *supra* note 82, at 102. *But see* B.M. v. State, 649 P.2d 425 (Mont. 1982) (holding that school authorities do owe a duty of reasonable care to individual students in testing and placing them in appropriate educational programs).

commentators, but not of courts."[87]

Educational malpractice claims generally are premised on a traditional negligence theory.[88] The necessary elements for this claim are an existing legal duty, breach of that duty, a resulting injury, and proximate cause between the breach and the resulting injury.[89] Many claims are dismissed for lack of a legal duty from instructors to students.[90] Students have asserted that a legal duty arises when a teacher accepts his or her role as an educator, or as a result of the "'special relationship between students and teachers which supports [the teachers'] duty to exercise reasonable care.'"[91] At least one court held that a legal duty of care requires balancing several factors including the following:

> [T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.[92]

In addition to finding a legal duty, courts also have difficulty finding proximate cause.[93] This difficulty arises from the inability of courts to determine the impact that factors outside the classroom have on the educational process.[94] Plaintiffs also have trouble identifying and quantifying specific damages.[95]

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87. Eschweiler, *supra* note 82, at 102.

88. *See id.* at 107.

89. *See id.*

90. *See id.* While some courts simply find that educators have no legal duty to educate, others may find that the duty is owed to the public, not to the individual student because the primary purpose of education is to benefit the public. *See* McBride, *supra* note 33, at 475.

91. *See* Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854, 858 (Cal. Ct. App. 1976) (citing cases which enforced rights, opportunities or privileges of public students, but did not involve the specific question regarding duty of care).

92. *Id.* at 859-60 (quoting Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968)).

93. *See* Eschweiler, *supra* note 82, at 108.

94. *See id.* at 109 (noting possible outside factors such as the physical, emotional, or neurological make-up of the student; and the cultural and social environment in which the student resides).

95. *See id.* at 110 (discussing traditional tort doctrine regarding quantifying

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While negligence is the primary theory for educational malpractice, such claims also may be based on substantive due process, contract and misrepresentation.[96] As with negligence claims, however, most are dismissed for failure to state a cause of action.[97] For example, constitutional claims have been unsuccessful because no express or implied right exists to an education under the Constitution.[98] Claims for negligent misrepresentation generally are treated the same as claims for negligence.[99]

Alternatively, some courts recognize a legitimate cause of action but dismiss the claim for public policy reasons.[100] These public policy considerations may include: "(1) judicial intrusion into the educational process; (2) the social utility of education; (3) the student-teacher relationship; and (4) the economic and administrative impact upon schools."[101] Rather than specifically dismiss the claim on public policy grounds, many courts reason that public policy inhibits finding a duty of

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damages).

96. *See id.* at 102.

97. *See id.* at 110 (noting the difficulty in establishing three of the essential components to a tort claim).

98. *See* McJessy, *supra* note 5, at 1781-82.

99. *See id.* at 1778 (noting, however, that claims for intentional misrepresentation may succeed while negligence alone may not).

100. *See* Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1354 (N.Y. 1979) (reasoning that "[t]o entertain a cause of action for 'educational malpractice' would require the courts not merely to make judgments as to the validity of broad educational policies . . . but, more importantly, to sit in review of the day-to-day implementation of these policies.").

101. Eschweiler, *supra* note 82, at 111. Judicial intrusion requires the court to substitute its judgment for that of professional educators. *See id.* at 112. The social utility of education factor indicates that a problem exists when a student has not been adequately taught. *See id.* at 113. The student-teacher relationship factor means that there is unequal power between the educator and student and thus, judicial intervention may be necessary in some circumstances. *See id.* at 114. Finally, the economic and administrative impact factor requires the court to consider schools' possible exposure to false claims, and the financial burden of such claims. *See id.* at 113. As one court states:

> the court would be engaged in a comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies that enter into the consideration of whether the method of instruction and choice of textbook was appropriate, or preferable. . . . Such inquiry would constitute a clear "judicial displacement of complex educational determinations" that is best left to the educational community.

Andre v. Pace Univ., 655 N.Y.S.2d 777, 779-80 (N.Y. App. Div. 1996) (quoting Paladino v. Adelphi Univ., 454 N.Y.S.2d 868, 872 (N.Y. App. Div. 1982)).

care.[102]

B. *Historical Treatment in Minnesota*

1. *Discipline*

Due process analysis of alleged unfair disciplinary action generally includes U.S. Supreme Court precedent.[103] The Minnesota Supreme Court, relying on *Goss v. Lopez*,[104] dealt directly with the issue in *Abbariao v. Hamline University School of Law*.[105] The plaintiff was a third-year law student at Hamline when he was expelled for failing to maintain a minimum grade point average.[106] He sought an injunction preventing the school from expelling him, claiming in part that the expulsion violated his due process rights under the Fourteenth Amendment.[107]

For purposes of the appeal, the court assumed that Hamline University was a "state" entity and thus subject to constitutional restrictions.[108] The supreme court confirmed that a student's interest in attending a public college or university is a property interest requiring due process compliance.[109] Citing *Goss*, the court stated that the requisite procedural protections depended on balancing the student's interests and needs and the university's interests and resources.[110] The court then acknowledged the difference between discipline relating to student misconduct and discipline relating to academic deficiency.[111] The court held that a hearing is necessary only in cases of student misconduct.[112] However, in cases of academic deficiency, "if a student's expulsion results from the arbitrary, capricious, or bad-faith actions of university officials, the judiciary will intervene and direct the university to treat the student

102. *See* McBride, *supra* note 33, at 475-76.

103. *See, e.g.*, Carey v. Piphus, 435 U.S. 247 (1978); Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978); Goss v. Lopez, 419 U.S. 565 (1975).

104. 419 U.S. 565 (1975).

105. 258 N.W.2d 108 (Minn. 1977).

106. *See id.* at 110. The student had a cumulative grade point average of 1.79 on a 4.0 scale after two and a half years as a student. *See id.*

107. *See id.* at 111. The district court dismissed the plaintiff's claim for failure to state a cause of action. *See id.*

108. *See id.* at 111-12 (assuming sufficient state action because the complaint was dismissed for failure to state a claim).

109. *See id.* at 112 (questioning what procedural protections are afforded to the plaintiff given the specific facts).

110. *See id.*

111. *See id.*

112. *See id.* (noting that a hearing is only necessary here to ensure fair factfinding, unlike cases of academic deficiency where a student's exams and grades are the only relevant facts).

fairly."[113]

Plaintiff claimed that school officials acted arbitrarily and capriciously by singling out his exams for grading and that the grading was biased because school officials knew that he was on probation.[114] The court held that the plaintiff stated a valid claim for relief.[115]

In addition to recognizing a due process claim against public universities, the court in *Abbariao* also confirmed a common law claim against private universities.[116] The common law analysis pertaining to academic discipline parallels the due process analysis.[117] Thus, in Minnesota, students at private universities also are protected against university officials' arbitrary, capricious and bad-faith actions.[118]

A third type of protection in disciplinary situations recognized in *Abbariao* is contractual protection.[119] The court held that contract law does apply to student-university relationships but is not rigidly applied.[120]

Another Minnesota Supreme Court case addressed not a public school's disciplinary action, but school restrictions on extracurricular hockey activities.[121] Without invoking a constitutional analysis in reviewing public school rules, the court limited itself to intervention only when school action was arbitrary and capricious.[122] The court stated that substituting its judgment for that of school officials "would result in

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113. *Id.*
114. *See id.*
115. *See id.* at 113.
116. *See id.* at 112-13 (noting that such common law claim was originally recognized in Gleason v. University of Minn., 104 Minn. 359, 116 N.W. 650 (1908)).
117. *See id.* at 113.
118. *See id.*
119. *See id.*
120. *See id.* (holding that Hamline University was not bound by a bulletin posted three years before by a law school then not affiliated with Hamline University).
121. *See* Brown v. Wells, 288 Minn. 468, 475, 181 N.W.2d 708, 712 (1970) (reviewing school rules preventing participation in League hockey tournaments if a student also plays for an independent hockey team or attends an outside hockey camp or clinic).
122. *See id.* at 710-11. The court stated:

> [T]he court must determine if the board's action is so willful and unreasoning, without consideration of the facts and circumstances, and in such disregard of them as to be arbitrary and capricious. Where there is room for two opinions on the matter, such action is not "arbitrary and capricious," even though it may be believed that an erroneous conclusion has been reached.

Id.

confusion detrimental to the management, progress, and efficient operation of our public school system."[123] The hockey eligibility rule was not clearly wrong, and thus the court refused to intervene.[124]

2. *Educational Malpractice*

Minnesota has little history regarding educational malpractice claims. In fact, only *Vilett v. Moler*,[125] decided by the Minnesota Supreme Court in 1900, is even remotely related. In *Vilett*, the plaintiff brought claims against the defendant barber school for false and fraudulent representations.[126] The trial court permitted the case to be sent to the jury.[127] The supreme court held that a claim was actionable if the school made a false statement with intent to deceive and the parties had unequal knowledge of the relevant facts.[128]

IV. THE *ZELLMAN* DECISION

A. *The Facts*

M.Z. was enrolled in an American history course at a public high school in defendant's district during the 1997-98 school year.[129] At the beginning of the school year, school officials distributed a copy of the student handbook to students including M.Z.[130] The handbook described plagiarism[131] and pronounced a grade of zero for a first offense.[132]

At the beginning of spring semester, M.Z.'s history teacher distributed behavioral guidelines to her students.[133] M.Z. signed a copy of

123. *Id.* at 711.
124. *See id.*
125. 82 Minn. 12, 84 N.W. 452 (1900).
126. *See id.* at 452. The plaintiff responded to an advertisement requesting males to attend its barber school. *See id.* at 453. The advertisement stated "$60 monthly guarantied after eight weeks' practice. Can place 500 graduates on palace trains, hospitals, or city shops at once. . . . We guarantee $15 weekly after two months' practice. . . ." *Id.* Plaintiff paid the $50 tuition. *See id.* However, after eight weeks instruction, plaintiff had not learned the trade and was refused further instruction. *See id.*
127. *See id.* at 453.
128. *See id.* at 454.
129. *See* Zellman v. Independent Sch. Dist. No. 2758, 594 N.W.2d 216, 218 (Minn. Ct. App. 1999), *review denied*, (Minn. July 28, 1999).
130. *See id.* at 218.
131. *See id.*
132. *See id.*
133. *See id.*

these guidelines.[134] The guidelines specifically stated, "that a violation could result in 'nullification of any/all points for [the] assignment in question.'"[135] As part of the history course, students were required to complete a final project.[136] M.Z.'s final project consisted of explaining "in his 'own words and perspective . . . the events which took place' during a particular decade."[137] Upon receiving the assignment, M.Z. joked, "about photocopying pages of a book, stapling the copies, and turning it in."[138] His history teacher overheard this statement and reiterated the implications of plagiarism.[139]

Despite these warnings, M.Z. and three additional students turned in final papers with large portions copied word for word from reference books.[140] After discussing the situation with the students and their parents, the teacher gave the students zero grades on their projects.[141]

Clearly dissatisfied with this punishment, M.Z. and his parents discussed the matter again with his teacher and principal.[142] After a second meeting with the parents, the principal affirmed the grade.[143] Upon appeal to the school superintendent, a hearing was held and M.Z. and his parents attended.[144] The superintendent conducted an investigation, interviewing the teacher and five classmates.[145] The superintendent then affirmed the grade.[146]

Upon appeal in a closed meeting, the school district board affirmed the grade.[147] M.Z.'s parents then filed a writ of certiorari with the Minnesota Court of Appeals to review the due process issues involved in the matter.[148] M.Z. raised several claims including breach of contract and denial of procedural and substantive due process.[149]

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134. *See id.*
135. *Id.*
136. *See id.*
137. *Id.*
138. *Id.*
139. *See id.* (stating the teacher informed the students specifically that the assignments must be written in the students' own words).
140. *See id.* at 218-19.
141. *See id.* at 219.
142. *See id.*
143. *See id.*
144. *See id.*
145. *See id.*
146. *See id.*
147. *See id.*
148. *See id.*
149. *See id.* (stating that M.Z. argued that the student handbook formed a unilateral contract between him and the school, entitling him to continued education and apparently, a passing grade for the project).

B. *The Court's Analysis*

The Minnesota Court of Appeals unanimously affirmed the school board's decision.[150] As to the contract claim, the court stated, "that a student handbook provided by a public school district does not form a unilateral contract between the student and the school district."[151]

The court also held that M.Z.'s right to due process was not infringed because he had no constitutionally protected property or liberty interest.[152] A protected property interest can arise only from "an independent source"[153] such as a state statute or a contract.[154] While entitlement to a public education is a protected property interest under state law,[155] the court held that M.Z. was not denied a public education.[156] Instead, he was given a zero grade.[157] This grade did not implicate a state law or contract, and thus did not give rise to a protected property interest.[158] Also, the injury to M.Z.'s academic reputation did not implicate a protected liberty interest.[159]

Finally, even if M.Z. did have a protected property or liberty interest, he received both procedural and substantive due process.[160] "Due process requires that a student receive oral or written notice of the charges and a hearing at which the student has an opportunity to present 'his side of the story.'"[161] The court found that M.Z. received several opportunities to tell

150. *See id.* at 222.

151. *Id.* at 220. The court justified this holding on two grounds. *See id.* at 219. First, it denied the claim on public policy grounds, maintaining that public education is the product of public desire for free education and not a contractual arrangement. *See id.* Second, the court addressed lack of consideration. *See id.* It held that unlike an employment situation or attendance at a tuition-charging school, the school receives no benefit from the student's attendance. *See id.* Rather, "[t]he state benefits from the education of its citizens and students benefit from their own educational success." *Id.*

152. *See id.* at 220 (pointing out that a successful due process claim requires a showing that the school deprived him of a property or liberty interest).

153. *Id.* (citing Goss v. Lopez, 419 U.S. 565, 574 (1975)).

154. *See id.*

155. *See* MINN. STAT. § 120A.20 (1998) (requiring public schools to provide a free education to students living within their districts).

156. *See Zellman*, 594 N.W.2d at 220.

157. *See id.*

158. *See id.*

159. *See id.* (citing Paul v. Davis, 424 U.S. 693, 701 (1976), and noting that "an injury to 'reputation alone, apart from some more tangible interests such as employment' does not involve a liberty interest").

160. *See id.* at 221-22 (stating that the school provided M.Z. with substantial due process and its decision was fair and reasonable).

161. *Id.* at 221 (quoting Goss v. Lopez, 419 U.S. 565, 581 (1975)).

his side of the story to school authorities and admitted to plagiarizing.[162]

Finally, the court stated that substantive due process requires a determination of whether the board's decision was arbitrary, capricious or unreasonable.[163] The court confirmed that the board "acted in an eminently fair and reasonable manner."[164]

V. THE *ALSIDES* DECISION

A. *The Facts*

Four students were enrolled at the defendant Brown Institute, Ltd. (Brown), a for-profit, proprietary trade school.[165] The students participated in a twelve-month Personal Computer/Local Area Network program at Brown in response to promotions the school set forth.[166] These promotions indicated that graduating students would be prepared to work as "PC installers and repairers and LAN installers, support technicians, and administrators," and eventually become Certified Network Administrators (CNA).[167]

Dissatisfied with the actual education they received, the students brought several claims against Brown.[168] They alleged that Brown committed fraud, misrepresentation, breach of contract, consumer fraud (in violation of the Minnesota Consumer Fraud Act) and deceptive trade practices (in violation of Minnesota's Uniform Deceptive Trade Practices Act).[169]

The district court dismissed plaintiffs' claims under summary judgment.[170] The district court stated that the claims sounded in

162. *See id.*

163. *See id.*

164. *Id.* at 221-22 (noting that students were told prior to beginning the project that copying text information would be considered plagiarism and result in a zero grade).

165. *See* Alsides v. Brown Inst., Ltd., 592 N.W.2d 468, 470 (Minn. Ct. App. 1999) (stating that the cost of tuition paid by the plaintiffs ranged from $8,385 to $10,127).

166. *See id.* (stating promotions included newspaper ads, a brochure, and a radio advertisement).

167. *Id.* One brochure specifically stated that "students would (1) learn 'today's most popular desktop systems;' (2) work with the most powerful computer chips on the market, including Pentiums, 486 PCs, Powermacs, and file servers; and (3) be prepared to take two industry-recognized certification tests, the Novell Certified Netware Administrator (CNA) exam and the A+ computer service certificate test." *Id.* at 470-71.

168. *See id.* at 471.

169. *See id.*

170. *See id.*

educational malpractice and were contrary to public policy.[171] In addition, the district court held that the Consumer Fraud Act and Deceptive Trade Practices Act do not apply to educational services.[172]

B. *The Court's Analysis*

In reviewing this case, the Minnesota Court of Appeals addressed the validity of educational malpractice claims in Minnesota for the first time.[173] The court acknowledged that the weight of authority in the country rejects complaints regarding the general quality of education that students receive.[174]

The court adhered to this general distaste for educational malpractice claims. However, consistent with law in other jurisdictions[175] and prior precedent in Minnesota,[176] the court held,

> [A] student may bring an action against an educational institution for breach of contract, fraud, or misrepresentation, if it is alleged that the institution failed to perform on specific promises it made to the student and the claim "would not involve an inquiry into the nuances of educational processes and theories."[177]

Applying the new rule, the court declared some claims as

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171. *See id.*
172. *See id.*
173. *See id.* at 472.
174. *See id.* The court pointed out the various public policy problems with educational malpractice. *See id.* These problems include:

> (1) the lack of a satisfactory standard of care by which to evaluate an educator; (2) the inherent uncertainties about causation and the nature of damages in light of such intervening factors as a student's attitude, motivation, temperament, past experience, and home environment; (3) the potential for a flood of litigation against schools; and (4) the possibility that such claims will "embroil the courts into overseeing the day-to-day operations of schools."

Id. (quoting Ross v. Creighton Univ., 957 F.2d 410, 414 (7th Cir. 1992)).
175. *See* Cencor, Inc. v. Tolman, 868 P.2d 396, 400 (Colo. 1994); Squires by Squires v. Sierra Nev. Educ. Found. Inc., 823 P.2d 256, 258 (Nev. 1991); Ryan v. University of N.C. Hosps., 494 S.E.2d 789, 791 (N.C. Ct. App. 1998); Malone v. Academy of Ct. Reporting, 582 N.E.2d 54, 56, 58-59 (Ohio Ct. App. 1990).
176. *See generally* Vilett v. Moler, 82 Minn. 12, 14-17, 84 N.W. 452, 453-54 (1900) (permitting issues of fraudulent inducement by a barber school to be submitted to the jury).
177. *Alsides*, 592 N.W.2d at 473 (citing *Ryan*, 494 S.E.2d at 791).

impermissible educational malpractice claims and upheld others as valid actions for breach of contract, fraud or misrepresentation.[178] In addition, the Minnesota Court of Appeals reversed the district court, holding that the Minnesota Consumer Fraud Practices Act and the Minnesota Uniform Deceptive Trade Practices Act may apply to educational services.[179]

VI. ANALYSIS

This analysis will discuss the trend in Minnesota law established by *Zellman* and *Alsides*, analyze whether the case holdings follow precedent established in Minnesota and federal courts, and discuss the policy implications of the decisions and how the decisions may affect education in the state.

A. *Trends Established in Minnesota Law*

On its face, *Zellman* establishes judicial support for school officials' decisions.[180] The *Zellman* court denied the plaintiff a contractual right against the school[181] and held that the plaintiff had no property or liberty interest violated in receiving a zero grade.[182] The court also decided that even if the plaintiff did have an implicated property right, he received due process.[183]

The plaintiff and his parents did not legally succeed, but they effectively succeeded: The principal, school board and Minnesota Court of Appeals reviewed the grade.[184] This result sends an underlying message that even if a school official takes relatively mild disciplinary measures for egregious student misconduct, students and parents can waste school and judicial officials' time and money. It is not a stretch to conclude that teachers and administrators either will be inclined or forced to succumb to student/parent complaints in order to avoid the inevitable waste of resources.

Alsides likewise established a judicial trend for court abstention from inspecting educational institutions,[185] permitting educational malpractice

178. *See id.* at 473-74.
179. *See id.* at 474-76.
180. *See* Zellman v. Independent Sch. Dist. No. 2758, 594 N.W.2d 216, 220 (Minn. Ct. App. 1999).
181. *See id.* at 219-20.
182. *See id.* at 220.
183. *See id.* at 221.
184. *See id.* 219.
185. *See Alsides*, 592 N.W.2d at 473-74.

claims only in certain circumstances.[186] Together, the cases generally provide that courts will not intervene with operations and decisions of educational institutions absent egregious circumstances.

B. *Relationship to Judicial Precedent*

1. *Discipline*

In deciding the plaintiff's breach of contract claim in *Zellman*, the Minnesota Court of Appeals held that no enforceable contract existed between the plaintiff and the school.[187] This outcome is fairly common for contractual analysis of public school students' cases.[188] Likewise, with respect to the due process analysis, the court's holding that plaintiff did not have a property or liberty interest infringed upon by receiving a failing grade parallels federal court decisions.[189] For example, in *Zehner v. Central Berkshire Regional School District*,[190] the court held that the use of the school parking lot was not significant and not a property right requiring due process protections.[191] *Zehner* further held that participation in interscholastic athletics does not amount to a constitutionally protected property interest.[192]

The Minnesota Court of Appeals also determined that a grade did not implicate a liberty interest because there was no tangible injury, only speculative damage to the plaintiff's reputation.[193] In deciding *Goss* the U.S. Supreme Court held that suspension for ten days or longer could seriously damage a student's reputation and thus implicate a liberty interest.[194] Arguably, a zero grade on a single project is much less serious than a ten-day suspension or even a one-day suspension. Thus, this

186. *See id.*

187. *See Zellman*, 594 N.W.2d at 219-20.

188. *See* Schweitzer, *supra* note 45, at 277 ("Compulsory education laws make public school enrollment a legal right for those of the appropriate age" and therefore, the voluntary acceptance of enrollment found in higher education is lacking, and no enforceable contract is formed).

189. *See infra* notes 190-94 and accompanying text.

190. 921 F. Supp. 850 (D. Mass. 1995).

191. *See id.* at 862.

192. *See id.* (explaining that this holding would apply even where a student claimed "an interest in a future professional athletic career"); *see also* Seamons v. Snow, 84 F.3d 1226, 1235 (10th Cir. 1996) (stating that participation in a school's athletic program is not a constitutionally-protected property interest); Albach v. Odle, 531 F.2d 983, 985 (10th Cir. 1976) (holding that participation in athletics and membership in school clubs are not protected property interests).

193. *See Zellman*, 594 N.W.2d at 220.

194. *See* Goss v. Lopez, 419 U.S. 565, 575-76 (1975).

portion of the *Zellman* court's decision comports with precedent.

Finally, the *Zellman* court determined that even if the plaintiff had a protected property or liberty interest in his grade, the school provided sufficient due process.[195] Due process merely requires notice and an opportunity to be heard, which the plaintiff received.[196] Certainly the numerous hearings provided by the principal and school board exceeded the acceptable opportunity to be heard present in previous cases.[197]

2. *Educational Malpractice*

Minnesota courts have not previously addressed educational malpractice claims.[198] The *Alsides* decision, however, corresponded with the great weight of authority in this country.[199] That is, a significant majority of jurisdictions reject general educational malpractice claims on public policy grounds.[200] In addition, although many courts may not expressly state the fact, most courts leave room for valid claims involving

195. *See Zellman*, 594 N.W.2d at 221.

196. *See supra* notes 161-62 and accompanying text.

197. *See, e.g., Goss*, 419 U.S. at 584 (requiring "at least an informal give-and-take between student and disciplinarian" and providing the student with "the opportunity to characterize his conduct and put it in what he deems the proper context"); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961) (requiring that the student be given "the names of the witnesses against him and an oral or written report on the facts to which each witness testifies" and "the opportunity to present to the Board, or at least an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf"); Zehner v. Central Berkshire Reg'l Sch. Dist., 921 F. Supp. 850, 860 (D. Mass. 1995) (holding that the student's meeting with the school principal and his mother where the student was informed of his violations and given a chance to respond, was sufficient due process).

198. In fact, the only precedent the *Alsides* court relied upon was a 1900 case, Vilett v. Moler, 82 Minn. 12, 84 N.W. 452 (1900). In *Vilett*, the court permitted the plaintiff to bring charges of fraudulent misrepresentation against the defendant barber school. *See id.* at 17, 84 N.W. at 454.

199. *See infra* note 200 and accompanying text.

200. *See, e.g.*, Ross v. Creighton Univ., 957 F.2d 410, 415 (10th Cir. 1992) (refusing to "recognize the tort of educational malpractice"); Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854, 861 (Cal. Ct. App. 1976) (stating that the consequences of exposing schools to tort claims would burden society beyond calculation); Cencor, Inc. v. Tolman, 868 P.2d 396, 398 (Colo. 1994) (affirming that educational malpractice claims are not recognized in the jurisdiction); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1354-55 (N.Y. 1979) (stating that educational malpractice claims would require the court to blatantly interfere with the school district's constitutional responsibilities); Andre v. Pace Univ., 655 N.Y.S.2d 777, 779 (N.Y. App. Div. 1996) (extending the policy of non-judicial interference in educational malpractice claims to contract actions against private educational institutions).

school officials' more severe conduct.[201] The court in *Alsides* explicitly provides an exception to the general rule rejecting educational malpractice claims.[202]

C. *Policy Implications*

The policy implications of the *Zellman* and *Alsides* decisions are five-fold. First, the decisions support the theory that, absent egregious circumstances, courts must abstain from reviewing decisions of professional educators and education officials. Such abstention is necessary to ensure effective class planning, control and learning. This is especially true in primary and secondary schools. In these circumstances, where students are younger and receive a "free" education, discipline and guidance are essential to ensure that each individual in the classroom receives the best quality of instruction.

Judicial intervention affects schools and learning in several ways. Intervention may cause educators to make teaching decisions that, in ordinary circumstances and according to their level of instructing skill and knowledge, they would not have made. Judicial intervention also may inhibit disciplinary measures in school. This in turn has several ramifications. First, it promotes negative character traits in children. On a more serious level, "[i]ncidents of violence and disorderly conduct—shootings, profanity and plain failure to obey rules—are escalating."[203] On a different level, lack of discipline creates children who are rude, irresponsible and ill-behaved.[204] At least one commentator goes further, stating that the lack of disciplinary measures has caused deculturalization, "allowing an erosion of tradition and sensible expectations over time."[205]

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201. *See, e.g.*, *Ross*, 957 F.2d at 416-17 (permitting breach of contract claims against an educational institution if the plaintiff can identify a specific contractual promise which the defendant failed to fulfill); *Cencor*, 868 P.2d at 399 (distinguishing claims where educational institutions allegedly "failed to provide specifically promised educational services, such as a failure to offer any classes or a failure to deliver a promised number of hours of instruction"); *Donohue*, 391 N.E.2d at 1354 (limiting its holding with the statement "[this] is not to say that there may never be gross violations of defined public policy which the courts would be obliged to recognize and correct."); *Andre*, 655 N.Y.S.2d at 779 (stating that the court may permit claims "sounding in 'educational malpractice'" if they are sufficient under traditional tort law).

202. *See* Alsides v. Brown Inst., Ltd., 592 N.W.2d 468, 473-74 (Minn. Ct. App. 1999) (explaining that valid causes of action may arise for breach of contract, fraud or misrepresentation).

203. Wright, *supra* note 1, at 23.

204. *See id.* at 25.

205. *See* Wallis, *supra* note 1, at 32 (advocating moral instruction in schools, as well as intellectual or educational instruction).

When a court imposes liability on a school for taking disciplinary measures, the result is worse. School children, aware of their legal rights, use the judiciary as a threat to obtain immunity from school rules and regulations.[206]

The second policy implication is that failure to discipline one or two students disrupts the learning of other students in the classroom.[207] One teacher confirms that "[w]e're letting a few ruin it for the majority of kids who are eager to learn."[208]

Third, lack of discipline may encourage an environment where students continually aggravate other students.[209] For example, a sixth-grade girl in San Francisco endured months of sexual harassment from a classmate.[210] The school failed to take action against the classmate for fear of legal action by the boy and his parents.[211]

Fourth, the lack of permissible disciplinary measures may cause good teachers to resign.[212] One frustrated instructor who resigned from teaching stated, "This was chaos . . . . I wasn't teaching. I was just coping and making sure these kids got through the day alive."[213] Officials and administrators fearful of legal claims may fail to support their teachers. As a result, when teachers have neither administrative nor parental support, they become "isolated and frustrated."[214]

Fifth, lack of discipline supports the criticized "self-esteem" movement. This is a fairly recent educational theory with a primary purpose of building self-esteem in young students.[215] Educational commentators criticize this theory as sacrificing real education[216] and as promoting an unrealistic view of life.[217] For example, if a teacher

206. *See* Wright, *supra* note 1, at 25.
207. *See* Varner, *supra* note 1, at 18; Wright, *supra* note 1, at 23.
208. Wright, *supra* note 1, at 23.
209. *See infra* notes 210-11 and accompanying text.
210. *See* Carlson, *supra* note 1, at 27.
211. *See id.* Instead, the school lost $500,000 in a suit brought by the girl and her parents. *See id.*
212. *See* Wright, *supra* note 1, at 23.
213. *Id.*
214. *See id.* at 24.
215. *See* Wallis, *supra* note 1, at 33; Wright, *supra* note 1, at 25; *20/20*, *supra* note 1.
216. *See 20/20*, *supra* note 1 (noting that although kids felt good about themselves, they were not learning).
217. *See, e.g.*, Wallis, *supra* note 1, at 33; *20/20*, *supra* note 1. An instructor should never tell a student that she is brilliant. *See 20/20*, *supra* note 1. Doing so gets the student "caught up in being brilliant, rather than learning." *Id.* Rather, students should receive honest feedback and should be taught that success results from effort. *See id.* If instructors protect students from their weaknesses and failures, the students will never be able to improve upon those weaknesses. *See id.*

promotes a student's self-worth when such praise is undeserved, the student may be unable to cope with life's disappointments later.[218] That student will not have learned the value of perseverance, hard work, honesty and responsibility in obtaining success.[219] In addition, the self-esteem movement harms a student's performance because if he or she is praised for performing an easy task, he or she will not want to perform harder tasks.[220] Finally, inflating students' self-esteem may actually increase violent behavior among the students.[221] "People who have this inflated, grandiose view of themselves, when other people criticize them, they're likely to lash out and become angry and aggressive. . . . Conceited people get nasty when you burst their bubble of self-love."[222]

Although different from disciplinary cases, the policy implications of educational malpractice claims are similar. That is, judicial support whenever a student is dissatisfied with an aspect of her education hinders educators' instruction and decisions. Educators may be forced to make decisions that are risk-adverse rather than decisions based upon their professional instinct, knowledge, and skill. As a result, students fail to receive a quality education. Students and society lose in the end.

Perhaps with colleges and universities, where students attend voluntarily and usually pay to attend, students should have a greater say in their education. There must be a limit, however, to this say as well. Even these students will not receive proper education and guidance at the hands of skilled professionals if legal claims and judicial reprimands inhibit professionals' sound judgment. Nor will educational institutions survive monetarily if subjected to repeated legal claims.[223]

While *Zellman* and *Alsides* explicitly support these educational

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218. *See* Wallis, *supra* note 1, at 33; *20/20*, *supra* note 1.

219. *See* Wallis, *supra* note 1, at 33.

220. *See 20/20*, *supra* note 1. For example, a psychology professor named Carol Dweck from Columbia University performed a test on fifth-graders. *See id.* She gave one group an easy puzzle to solve, later telling them how smart they were. *See id.* A second group was given the puzzle, and later told not that they were smart, but that they tried hard. *See id.* Next, both groups were given a much harder test in which everyone did poorly. *See id.* Then the groups were asked to take more tests. *See id.* The second group of students who were praised for their effort were eager to take more tests. *See id.* The first group of students who were told they were smart "were reluctant to face further challenges." *Id.*

221. *See id.*

222. *Id.*

223. *See* Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854, 861 (Cal. Ct. App. 1976) ("[Educational institutions] are already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared. . . . The ultimate consequences, in terms of public time and money, would burden them—and society—beyond calculation.").

theories, the extensive process endured by the schools inherently supports the students' claims. That is, both schools were forced to sacrifice significant time and resources in defending the students' claims.

VII. CONCLUSION

In this country, parents, students, and school officials are frustrated with the lack of student discipline. Many commentators are calling for an end to the so-called student rights movement in which students can threaten legal action to obtain anything they want from schools.[224] The lack of discipline and decision-making by educators results in children who are ill-behaved and disrespectful of others.[225] It inhibits the ability of educators to effectively instruct students who are willing to learn.[226] The lack of discipline also hampers educators in carrying out their professional duties and forces educators to act as babysitters.[227]

In order to reinstate discipline, order and learning in the classroom, teachers must be able to make and enforce policies and rules according to their professional judgment. For successful rule making and enforcing, school administration must support teachers' decisions. The legal system plays a pivotal role in this chain of events. It must support the policies and decisions of school administration. Without this support, disgruntled students and parents can overcome decisions of school administrators, undermining educators and disrupting policies.

The Minnesota Court of Appeal's decisions in *Zellman* and *Alsides* carried out this pivotal role by largely rejecting student claims, except in egregious circumstances. It is essential to successful learning that judiciaries in other jurisdictions follow suit.

224. *See, e.g.*, Carlson, *supra* note 1; Wallis, *supra* note 1; Wright, *supra* note 1.
225. *See supra* notes 203-05 and accompanying text.
226. *See supra* notes 207-11 and accompanying text.
227. *See supra* notes 212-14 and accompanying text.